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87-1250

Supreme Court, U.S.
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CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

BERNALDO D. BICOY,

Petitioner,

against

STATE OF HAWAII,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

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NO. _____

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October Term, 1987

BERNALDO D. BICOY,

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against

STATE OF HAWAII,

Respondent.

QUESTIONS PRESENTED FOR REVIEW

Petitioner [1] presents the following questions for review:

A

Whether petitioner, defendant in the

---

[1] Manuel DeMello, Jr. and Kenneth K. Muraoka were also indicted with petitioner. DeMello was also convicted as charged. However, on December 5, 1986, he withdrew his related appeal to the Hawaii state supreme court. DeMello has no interest in the outcome of petitioner's present petition for writ of certiorari.

Muraoka died before the commencement of the first trial in 1985, and was not a defendant for trial nor conviction purposes.

state criminal action, was denied adequate and effective review where appellate counsel failed to supplement the record on appeal with trial transcript of pretrial hearings on motion to dismiss on constitutional grounds, the transcript of the last four days of trial, the transcript of the jury instructions settlement conference proceedings and the jury charge, and the transcript of the first jury trial, as to deprive petitioner of his constitutional right to effective assistance of counsel under the Sixth Amendment and a denial of his right of due process under the Fifth and Fourteenth Amendments.

B

Whether petitioner's right to a fundamentally fair trial under the Fourteenth Amendment was denied him where the state trial court permitted, over objection, the showing to the trial jury of the two incomplete telecast videotapes of television interviews with petitioner, in their edited

and truncated versions as prepared for news broadcast by the television stations.

C

Whether petitioner was denied due process under the Fifth and Fourteenth Amendments when the state trial court refused to give petitioner's proferred instructions covering the oral testimony of the unindicted co-conspirator as concerns her immunity-arrangement as it affected the issue of biased testimony.

D

Whether Hawaii's penal laws (Hawaii Revised Statutes ["HRS"] §708-831 - theft by deception) under which petitioner was indicted and convicted was unconstitutionally vague and ambiguous, and whether petitioner should have been charged under Hawaii's election laws, HRS §11-228, as opposed to Hawaii's penal laws, deprived petitioner of his right of due process under the Fifth and Fourteenth Amendments.

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

BERNALDO D. BICOY,

Petitioner,

against

STATE OF HAWAII,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

Petitioner prays that a writ of certiorari issue to review the judgment of the supreme court of the State of Hawaii entered against petitioner on October 7, 1987; petition for reconsideration denied without opinion on October 30, 1987.

This petition presents substantial questions of constitutional dimensions, and is not frivolous nor taken for delay.

OPINIONS BELOW

The Hawaii state supreme court's memoran-

dum opinion, which affirmed petitioner's conviction below, and its order denying reconsideration without opinion, are unreported. The petitioner was tried in the state trial court and was found guilty as charged by a jury and there is no rendered opinion by that trial court.

JURISDICTION

The judgment of Hawaii's highest state court was made and entered on October 7, 1987, affirming the conviction of petitioner, appended hereto as Appendix A. Reconsideration was denied without opinion on October 30, 1987, appended hereto as Appendix B. Petitioner's motion for post-conviction relief was denied on October 16, 1986, Record on Appeal Volume III ("R.A. III") at 116-208, Appendix J-1 at 99. The constitutionality of a state statute is here drawn in question and 28 U.S.C. §2403(b) may be applicable. Jurisdiction of this Court to review the Hawaii state supreme court judgment is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

United States Constitution

Amendment V: * * * nor be deprived of life, liberty, or property without due process of law; * * *

Amendment VI: In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence.

Amendment XIV: * * * nor be deprived of life, liberty, or property without due process of law; * * *

Statutes

Hawaii Revised Statutes ("HRS") §§708-831, 705-520, and pertinent excerpts of HRS chapter 11, hereto appended as Appendix C.

Hawaii Rules of Evidence

Hawaii Rules of Evidence ("HRE") Rule 106 and Rule 403, appended as Appendix D.

STATEMENT OF THE CASE

Petitioner, herein appearing as pro se, was convicted on his second trial by a jury

in the state court for first degree theft by deception, for the alleged violation of HRS §708-831, and for conspiracy to commit theft, in alleged violation of HRS §705-520. R.A. II at 202-203.

Petitioner and co-defendants Kenneth A. Muraoka and Manuel DeMello, Jr., were indicted [2/] under the Hawaii penal statutes. R.A. I at 1-6.

Petitioner had unsuccessfully sought the democratic party nomination for the office of lieutenant governor of Hawaii in the 1982 state primary elections. Transcript 7/3/86 I ("Tr. 7/3/86 I") at 19.

In the course of his campaign, petitioner established his campaign committee, appointed his campaign treasurer, and generally conducted his political campaign pursuant to Hawaii's election laws, HRS chapter 11, Appen-

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[2/] The indictment in the Record on Appeal is the only available reference cite as to the nature of petitioner's alleged criminal acts.

dix C at 46-54.

In July, 1982, petitioner submitted the appropriate forms to the state campaign spending commission for matching public funds for his campaign. Tr. 6/30/86 I at 44-47.

Petitioner's campaign committee, with the campaign treasurer in particular, handled all finances and decided which contributors' names were to be listed for submission to the state campaign spending commission. Tr. 7/1/86 II at 76-84.

It is alleged in the indictment that in the course of the campaign, the petitioner, Kenneth Muraoka, Manuel DeMello and Elizabeth Abriscé, conspired to obtain matching public funds by deception by contributing $100 each for 56 individuals, but who in fact had made no individual contributions to the campaign, in violation of the election laws, R.A. I at 1-6. Through an audit conducted in behalf of the state campaign spending commission, it was alleged that through such a scheme, these 56 names had been submitted to the commis-

sion in order to qualify for matching public funds. Petitioner's campaign eventually received the total amount of $24,430 in public funds. Tr. 6/30/86 I at 48.

These irregularities in the audit received public attention through the local media. Tr. 7/7/86 at 7-8.

On July 11 and 12, 1984, petitioner consented to be interviewed by two local television stations, KHON-TV and KGMB-TV. Id., at 12-20; Appendix E at 57-62.

During each separate interview, petitioner responded to some 6 to 10 questions put to him by the reporters. Each interview lasted approximately 6 to 10 minutes in duration. Id., at 12, 19; Appendix E at 57-59.

The television stations later edited and truncated these videotapes for broadcast. The cut-off portions were not available at trial, as they were "recycled" by the television stations. Tr. 7/2/86 IV at 39.

On October 14, 1987, petitioner and the other two defendants were indicted for first

degree theft by deception and for conspiracy to commit theft. R.A. I at 1-6.

The first trial in August-September, 1985, was declared a hung jury mistrial. R.A. I at 147-150.

The second trial commenced on June 30, 1986, and continued to July 14, 1986. Randall N. Harakal, who did not participate in the first trial, was petitioner's trial counsel in the second trial as well as his appellate counsel. R.A. I at 169, R.A. II at 202, R.A. III at 91-94.

Petitioner moved for the pretrial dismissal of the indictment on constitutional grounds, R.A. I at 169-184; the motion was denied, R.A. II at 206-207.

In the second trial, petitioner objected to the evidentiary offer of the two newscast videotapes, on the grounds that they were edited and prejudicially incomplete, predicating his objection on HRE Rules 106 and 403.

Petitioner's in limine motion to exclude

the videotapes was filed, R.A. II at 1-13, followed by oral objection made during in chambers voire dire hearing, Tr. 7/2/86 IV at 19-26, and was denied. The trial court opted not to hear petitioner's interview-testimony although offered. Id., at 26, Appendix F at 76. The state trial court admitted the videotapes in evidence, Id., at 25-26, Appendix F at 74-76, and the videotapes were shown to the jury. Id., at 32. Written transcriptions made of the videotapes were admitted in evidence. Id., at 31-32, Appendix G at 77-78.

State witness Elizabeth Abrisce testified as the unindicted co-conspirator under an immunity agreement with the respondent State, Tr. 6/30/86 I at 96-116; Appendix H at 90-93.

At the conclusion of the second trial, petitioner was found guilty and was sentenced to five years probation, with certain special conditions of probation including $23,430 restitution, $5000 fine, 500 hours of community service, and 120-day imprisonment,

R.A. III at 98-99, but which imprisonment term petitioner, pending appeal, has since completed serving.

Petitioner filed timely notice of appeal, R.A. III at 93-94. However, no designation of record on appeal was ever filed by appellate counsel. Nor was the record on appeal supplemented with the transcript of the hearing on the pretrial motion to dismiss the indictment. Petitioner claimed these penal statutes [HRS §§708-831 and 705-520], Appendix C at 44-45, under which petitioner was charged, to be unconstitutionally vague and ambiguous, R.A. I at 169-184, and that on the contrary, petitioner should have been charged under the elections laws, HRS §11-228. See, Appendix C at 53-54.

Nor was the record on appeal supplemented with the transcript of the jury instructions settlement conference or of the jury charge.

In the course of the petitioner's appeal, appellate counsel's motions for leave to file the opening brief in excess of 35 pages and

without references to the record on appeal or transcript were denied. Appendices J-2 at 101 and J-3 at 102. But appellate counsel nonetheless filed the opening brief devoid of references. Upon motion of respondent State, the opening brief was struck. Appendix J-6 at 106. There followed subsequent requests by appellate counsel to the state supreme court to supplement the record on appeal, one of which was twice denied, Appendix J-4 at 103 and J-5 at 104; but another was granted, Appendix J-7 at 108.

On October 7, 1987, the Hawaii supreme court, in its memorandum opinion stated that "given the record" before it, affirmed petitioner's conviction. Appendix A at 37, 41.

On October 30, 1987, the Hawaii supreme court denied, without opinion, petitioner's motion for reconsideration of the court's memorandum opinion. Appendix B at 43.

The issue of ineffective assistance of counsel was first raised by petitioner in his motion for reconsideration of the state sup-

reme court's memorandum opinion.

Petitioner was admitted in 1956 to practice law in the State of Hawaii. 3/ Tr. 7/3/86 V at 4. Petitioner had been previously elected to two terms to the Hawaii state house of representatives, the first in 1959 and again in 1969. Id., at 11.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I

The failure of appellate counsel to perfect petitioner's appeal of his conviction deprived petitioner of his right to the effective assistance of counsel secured to him under the Sixth Amendment.

Because appellate counsel failed to perfect the appeal, petitioner was denied his absolute right to appeal his jury conviction; thus, he was deprived of his right to the

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3/ The Hawaii supreme court issued an order in October, 1986, temporarily restraining petitioner from further engaging in the practice of law pursuant to its rules because of his felony conviction. Office of Disciplinary Counsel v. Bernaldo D. Bicoy, Case No. 11586.

effective assistance of counsel. Barrientos v. U.S., C.A.Tex.1982, 668 F.2d 838, 842 (where failure to file appeal based on guilty plea, however).

The Sixth Amendment secures to an accused the right to the effective assistance of defense counsel, which also applies to assistance of counsel on appeal; and the same standards applied to trial counsel competency should apply in measuring competency of appellate counsel. Sims v. State, 1980, 295 N.W.2d 420, 424 (but Sims failed to carry burden to establish performance of appellate counsel to fall below range of normal competency).

Having filed the notice of appeal on September 8, 1986, R.A. III at 93-94, appellate counsel did nothing further for 77 days thereafter, despite the State's appellate procedural rule to submit transcript requests within 10 days post filing of notice of appeal.

But the failure of appellate counsel to

supplement the record on appeal by transcript of testimonial evidence as well as the rulings of the trial court occurring during the last four days of trial, compounded by his failure to further supplement the record with the transcript of the settlement instructions proceedings and the jury charge, and add to such litany the lack of transcript of the pretrial and post-trial motion proceedings, manifest a totality of substantial failures by counsel which bespeak the denial to petitioner of his right to the effective assistance of counsel as secured under the Sixth Amendment.

Two of the three points on appeal urged by defendant below, the petitioner here, were substantially and prejudicially affected, if not influenced, adversely, by the lack of inclusion in the record on appeal of the transcript of the evidentiary presentation below.

One point on appeal urged by defendant below is that the trial court had erred in

denying petitioner's motion to dismiss the indictment on constitutional grounds. R.A. I at 169-184; R.A. II at 206-207. But without the transcript of the pretrial motion proceedings, appellate review was not only short-circuited, but made impossible.

The other point urged on appeal is that the trial court erred in refusing to give petitioner's proferred jury instructions numbers 46 and 47, Appendix K at 110, involving the testimony of the unindicted co-conspirator. R. A. II at 24-102.

But again, lacking the transcript of the settlement instructions proceedings denies and makes nugatory petitioner's efforts to challenge his conviction, to his substantial prejudice on appeal.

Petitioner submits that but for the serious and substantial deficiency in the record on appeal, the outcome of the appellate review would have been different. Messer-v. State, Fla.1983, 439 So.2d 875.

In summary then, because the record is bereft and barren of the facts otherwise adduced at trial and relevant to the review process, the state supreme court was presented with an inadequate record on appeal by appellate counsel so as to lack sufficient clarity as would enable it to decide the questions presented by petitioner for its review.

Assuming, arguendo, that the record alone might withstand attack on non-federal grounds, petitioner submits that what flowed from this consistent pattern of omissions by appellate counsel was a substantial and serious deficiency measurably below that of competent counsel, and this adversely affected the outcome of the appeal.

The totality of the circumstances made manifest by an inadequate record on appeal glaringly points out the serious deficiencies mentioned as to infect it with a denial of the petitioner's constitutional right to effective assistance of counsel secured to

him under the Sixth Amendment.

II

In allowing into evidence and the subsequent showing to the trial jury of the two telecast videotapes which were edited and truncated for purposes of broadcast, petitioner submits it so infected the trial below as to deny fundamental fairness and thus violative of defendant's right of due process under the Fourteenth Amendment.

It has not been denied that these two videotapes were edited and truncated for the purpose of being telecast as a news item.

HRE Rule 106, which is identical with Federal Rules of Evidence ("FRE") Rule 106, [4/] is an expression of the rule of completeness, based on two considerations: the first is the misleading impression created by taking matters out of context, and second, concerns the adequacy of repair work when delayed to a point later in the trial. 28 USCA, FRE Rule 106, p. 71.

[4/] Appendix D at 55.

HRE Rule 403, [5] which is identical with FRE Rule 403, recognizes that certain circumcumstances call for the exclusion of evidence which is of unquestioned relevance.

The case of Jamison v. Storer Broadcasting Co., D.C.Mich.1981, 511 F.Supp. 1286, reflects the judicial attitude that where the evidence appeals to a jury's sympathies and connects a party in a highly charged public issue, such evidence must be carefully evaluated under this rule which affords the trial court discretion to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, or needless presentation of cumulative evidence.

In the case at bar, the petitioner's television interviews took place on July 11 and 12, 1986, and his indictment handed down some three months later, on October 14, 1986.

Without the indictment in hand, the TV

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[5] Appendix D at 55.

interviews dealt with possible violations of the election laws, particularly HRS §11-202, Appendix C at 50, dealing with contributions made under false names.

But petitioner's subsequent indictment dealt with the issue of "qualifying contribution" [HRS §11-219, Appendix C at 51] critical to the commission of theft when obtaining matching public funds; whereas, three months earlier, on July 11 and 12, 1986, defendant's television interviews dealt with ordinary "contributions" which do not affect matching public funds.

It would not be unreasonable to suggest that the jury, after viewing the videotapes, might have easily confused the issues between ordinary "contributions" to a political candidate, which could not qualify for matching funds, as opposed to "qualifying contributions" necessary for obtaining matching public funds.

The record is clear that the trial court below, before it ruled on admissibility, had

excluded petitioner's interview-testimony which would have explained the true context of the full television interviews.

But once the videotapes had been shown to the jury, substantial unfair prejudice had been injected into the trial by this evidentiary presentation, and the subsequent testimonial effort of petitioner to explain the relevant innocent connotations present during the interviews in an attempt to dissuade the jury could not diminish from the jury's mind the impact engendered by such visual showing of the incomplete and ambiguous videotapes. On any theory of admissibility, the court would be required before ruling to listen at least to the evidence which might give meaning from the surrounding circumstances attending those ambiguous videotapes. The trial court here refused to hear petitioner's offered voire dire testimony.

It would not be unreasonable to characterize the sympathies of the jury in the case at bar as being emotionally straying away

from petitioner as a political figure under indictment accused of theft of public funds, of their money -- reasonable doubt or no --, political figures being suspect as they are by the public.

The notes of the Advisory Committee on Proposed Rules suggest that in reaching a decision on whether to exclude evidence on grounds of unfair prejudice, consideration should be given to the probable effectiveness, or lack of effectiveness, of a limiting instruction. 28 USCA, FRE Rule 403, p. 152.

The record on appeal here is barren of any suggestion of any cautionary or limiting instruction with which to charge the jury after the videotapes were admitted in evidence.

In essence, in permitting the edited and truncated versions of the videotapes to be shown to the jury, the trial court had allowed the presumably impartial television news editors to have unbridled discretion to intrude upon the province of the trier of

fact in their assessment of the full evidentiary weight of all of the evidence, and thus these news editors had deprived petitioner of his right to a jury determination of, as well as depriving the jury itself from, the complete facts otherwise present on the videotapes in their unedited versions.

Petitioner was thereby unfairly prejudiced, as any deliberations by the jury on such incomplete evidence and as further compounded by the absence of any cautionary or limiting instructions, denied him his right to a fundamentally fair trial.

Interestingly, the trial court, in admitting the videotapes, suggested the possible presence of exculpatory statements of petitioner on the rest of the videotapes not truncated and edited, Tr. 7/2/86 IV at 25, Appendix F at 74-75:

> As far as Mr. Bicoy's statements, they are statements by way of admissions and they're relevant as far as whether they are exculpatory statements that might have been on a tape. * * * In this case, it's mere

> speculation that they are exculpatory statements by Mr. Bicoy on a tape that Mr. Sagami or Wu [both TV reporters] at one time. The police may have gotten -- there is no evidence at all that in fact that's the case.

Despite its relevancy, these videotapes were "unfairly prejudicial" when shown to the jury because they had an undue tendency to suggest a decision on an improper basis, and they appealed under the circumstances to the jury's sympathies. Carter v. Hewitt, C.A. Pa.1980, 617 F.2d 961, 972.

Petitioner contends that the "unfair prejudice" of these videotapes outweighed their probative value, and their admission into evidence infected the fundamental fairness of the trial as to be a denial of due process of law for petitioner.

III

The trial court's failure to give defendant's cautionary or limiting instructions numbers 46 and 47 on the testimonial evidence of the unindicted co-conspirator amounts to denial of a fundamentally fair trial.

Due process does not require that instructions be given unless evidence supports it. Miller v. Stagner, C.A.9(Cal.) 1985, 757 F.2d 988, cert. den. 106 S.Ct. 1271, 89 L.Ed.2d 579.

Here the panoply of evidentiary presentation below supports the giving of the petitioner's proferred instructions numbers 46 and 47, Appendix K at 110, covering the issue of biased testimony of an unindicted co-conspirator, particularly in view that there were only two critical evidentiary matters upon which petitioner's conviction hinged, that of an alleged conspiracy through the uncorroborated conspiracy testimony of this unindicted co-conspirator, with the other being the videotapes.

Lacking the trial transcript for the last four days, it is unclear whether a limiting instruction on the uncorroborated conspiracy testimony of the unindicted co-conspirator under an immunity agreement was ever considered by the trial court. However, a post-

trial stipulation was entered into between the petitioner and respondent, with the approval of the Hawaii supreme court, wherein counsel was purportedly allowed to comment in his closing argument on the issue of bias of the testimony of the co-conspirator. Appendix I at 96-98.

It is tenable to suggest that the closing argument of counsel on the issue of bias does not rise to the level and dignity of a limiting jury instruction read from the bench; hence, the issue of fundamental fairness of the trial reaches constitutional dimensions in this case.

IV

Defendant was convicted under a constitutionally vague and ambiguous state statute as to deprive him of his rights of due process.

Petitioner submits that he should have been tried under the provisions of the elections laws, HRS chapter 11, instead of under the Hawaii penal code, as he was.

Regardless of respondent State's option

on whether to bring charges under the election laws, HRS §11-228, or under the penal code, HRS §708-831, nonetheless, petitioner's conviction under the general theft statute is, by definition, constitutionally infirm. Under the penal statutes' definition of the words "he", "him," "person," and "another", as one from whom theft by deception may be committed, it cannot be seriously contended that the State of Hawaii is a "person" in the commonly accepted definition of that word. Petitioner contends that since the penal code was enacted prior to the enactment of the election laws in question, it would be unreasonable to suggest that the state legislature could have contemplated in what manner the definitions as spelled out, with reference to criminal activities, would be applicable to conduct undertaken under the election laws. The legislative history is devoid of any indication that respondent State would be considered a "person", and that the taking of

property of the respondent State, through alleged misconduct under the election laws, would constitute a violation of the penal code.

At the time petitioner ran for political office, he did not have adequate notice that under the definitions in the election laws and the penal code that a violation under the election laws would expose him to theft by deception charges.

Statutory language is premised upon the common meaning of terms. Under the theft by deception statutes, definitionally, the respondent State is not considered a "person". It is encumbent upon the legislature to expand upon the meaning to provide adequate notice of potential criminal liability. Not having done so, petitioner should not be held criminally liable for the vagueness and ambiguities in the statutory language.

As this Court held in Estes v. Texas, 381 U.S. 532 (1965), where the probability of prejudice to the accused is inherent in the

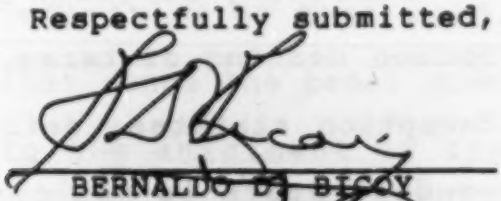
circumstances, it is not necessary to find identifiable prejudice in order to conclude that due process is wanting.

CONCLUSION

For the reasons set forth above, it is respectfully prayed that this petition for writ of certiorari to review the judgment of the Supreme Court of the State of Hawaii be allowed and granted.

DATED at Aiea, Hawaii, December 28, 1987.

Respectfully submitted,



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October Term, 1987

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against

STATE OF HAWAII,

Respondent.

AFFIDAVIT - CERTIFICATION OF APPENDICES AS TRUE COPIES OF ORIGINALS

STATE OF HAWAII)
:ss.
CITY AND COUNTY OF HONOLULU)

I, BERNALDO D. BICOY, petitioner pro se, having been sworn, on oath, depose and say:

That the each of the appendices hereto appended and respectively marked as shown are true copies of the original or duplicate original copies on file with and are part of the Record On Appeal in the captioned case of State of Hawaii v. Bernaldo D. Bicoy et

al, Hawaii Supreme Court Case No. 11634, it being necessary to have the same re-typed to be accomodated as Appendices to the Petition For Writ Of Certiorari in compliance with the dimensional measurements requirements of Rule 33.1(d) of the Supreme Court Rules.

BERNALDO D. RICOY

Subscribed and sworn to before me, at Aiea, City and County of Honolulu, State of Hawaii, this 28th day of December, 1987.

Notary Public, State of Hawaii

My Commission expires: 12/7/90

APPENDIX A

NO. 11634

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII,	)	CRIMINAL NO. 84-0350
	)	
Plaintiff-Appellee,	)	APPEAL FROM THE JUDGMENT; GUILTY CONVICTION AND PROBATION SENTENCE; NOTICE OF ENTRY, FILED AUGUST 29, 1986
vs.	)	
	)	
BERNALDO D. BICOY,	)	
	)	
Defendant-Appellant,	)	FIRST CIRCUIT COURT
	)	
	)	HONORABLE ROBERT WON BAE CHANG
and	)	
	)	HONORABLE DANIEL G. HEELEY
KENNETH K. MURAOKA and MANUEL DEMELLO, JR.,	)	HONORABLE MARIE N. MILKS
	)	HONORABLE MARILYN LEE
	)	HONORABLE ROBERT G. KLEIN
Defendants.	)	Judges

MEMORANDUM OPINION

This is an appeal from the conviction of Defendant-Appellant Bernaldo D. Bicoy (hereinafter "Bicoy") for First Degree Theft (Hawaii Revised Statutes (hereinafter "HRS") §708-831) and Conspiracy to Commit Theft (HRS §705-520) from Plaintiff-Appellee State of Hawaii (hereinafter "State"). The conviction arose from alleged improprieties in Bicoy's

1982 campaign for the office of Lieutenant Governor. An investigation by the Hawaii State Campaign Spending Commission and the Office of Prosecuting Attorney found that Bicoy had received $23,430 from State matching election funds based upon false contribution records.

On October 11, 1984, a Grand Jury indicted Bicoy along with co-defendants Kenneth K. Muraoka [1/] and Manuel DeMello, Jr. [2/] The indictment alleged that between 1981 and September 1982, the defendants and unindicted co-conspirator Elizabeth C. Abrisce (hereinafter "Abrisce") [3/] had engaged in a conspi-

---

1/ Kenneth K. Muraoka was a co-chairperson in Bicoy's campaign. He passed away prior to trial and was therefore not a defendant for trial or conviction purposes.

2/ Manuel DeMello, Jr., was a "coordinator" in Bicoy's campaign. He was also convicted of Theft and Conspiracy to Commit Theft. His related appeal (No. 11621) was withdrawn on December 5, 1986.

3/ Elizabeth Abrisce was a co-chairperson in the Bicoy campaign and a witness under an immunity agreement with State.

racy to misrepresent campaign fund donations in order to obtain matching funds from the State. The idea was that the co-defendants would solicit names from lists of Bicoy's relatives and supporters to "contribute" various amounts of money to the Bicoy campaign. In actuality, no money was donated by the people listed. The indictment further alleged that Bicoy executed and filed the fraudulent list of donations with the campaign spending commission on September 8, 1982.

On February 27, 1985, Bicoy filed a Motion to Dismiss for Failure to Charge a More Specific Misdemeanor on the theory that he should have been prosecuted under HRS §11-228 for misdemeanor violation of election laws as opposed to felony theft. On June 27, 1985 the motions court denied the motion on the basis of State v Martin, 62 Haw. 364, 616 P.2d 193 (1980).

Bicoy's first trial ended in a hung jury mistrial on September 9, 1985. Prior to his

second trial, on June 17, 1986, Bicoy filed a Motion to Dismiss on Constitutional Grounds on the theory that HRS §708-831 was unconstitutionally vague as applied to his misappropriation of funds from the State. On July 16, 1986 the motions court again denied the motion.

Bicoy's second trial occurred in early July 1986. State presented testimony from thirteen witnesses. Abrisce testified as to the conspiracy. 4/ State also offered documentary evidence, including edited news videotapes of statements by Bicoy which were broadcast by KGMB-TV and KHON-TV. 5/ During trial, Bicoy filed a motion in limine seeking

---

4/ The existence of Abrisce's witness immunity agreement was disclosed to the jury at several points during the trial.

5/ News directors James Harlan Manke (KGMB-TV) and Jack Kellner (KHON-TV) testified that the stations only kept the edited broadcast videotapes for storage.

to exclude the videotapes under Rules 106 and 403 of the Hawaii Rules of Evidence. The trial court denied the motion.

At the close of trial, the court refused, over Bicoy's objection, Defendant's Proposed Jury Instruction Nos. 46, 47, and 49. Bicoy was convicted of First Degree Theft and Conspiracy to Commit Theft and was subsequently sentenced. 6/

Appellant urges several points on appeal as error committed by the trial judge. However, after listening to arguments of counsel, and given the record before us, we cannot say that the trial judge committed error. Affirmed.

6/ On September 29, 1986, the trial court, merging the theft and conspiracy counts, entered a fifth amended judgment of conviction and sentenced Bicoy to five years probation with special conditions of a $5,000 fine, a 120 day jail term, 500 hours of community service, and $23,430 restitution.

DATED: Honolulu, Hawaii, October 7, 1987.

Randall N. Harakal
(Shigemura & Ching, of counsel), for Defendant-Appellant

Peter Van Name Esser
Deputy Prosecuting Attorney, for Plaintiff-Appellee

[Signed:]

H. LUM [C.J.]
EDWARD H. NAKAMURA
FRANK PADGETT
YOSHIMI HAYASHI
WALTER M. HEEN

APPENDIX B

NO. 11634

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII,	CRIMINAL NO. 84-0350
Plaintiff-Appellee,	APPEAL FROM THE JUDGMENT; GUILTY CONVICTION AND PROBATION SENTENCE; NOTICE OF ENTRY, FILED AUGUST 29, 1986
vs.	
BERNALDO D. BICOY,	
Defendant-Appellant,	FIRST CIRCUIT COURT
and	HONORABLE ROBERT WON BAE CHANG
KENNETH K. MURAOKA and MANUEL DEMELLO, JR.,	HONORABLE DANIEL G. HEELEY
	HONORABLE MARIE N. MILKS
	HONORABLE MARILYN LEE
Defendants.	HONORABLE ROBERT G. KLEIN
	Judges

ORDER DENYING MOTION FOR RECONSIDERATION

Appellant's Motion for Reconsideration filed on October 26 1987 is hereby denied.

DATED: Honolulu, Hawaii, October 30, 1987.

Bernaldo D. Bicoy,
Pro Se, on the motion

[Signed:]
H. LUM [C.J.]
EDWARD H. NAKAMURA
FRANK PADGETT
YOSHIMI HAYASHI
WALTER M. HEEN

APPENDIX C

HAWAII REVISED STATUTES ("HRS") §§708-831 and 705-520 read:

§705-520 Criminal conspiracy. A person is guilty of criminal conspiracy if, with intent to promote or facilitate the commission of a crime:

(1) He agrees with one or more persons that they or one or more of them will engage in or solicit the conduct or will cause or solicit the result specified by the definition of the offense; and

(2) He or another person with whom he conspired commits an overt act in pursuance of the conspiracy.

§708-830 Theft. A person commits theft if he does any of the following:

(1) * * * *

(2) Property obtained or control exerted through deception. He obtains, or exerts control over, the property of another by deception with intent to deprive him of the property; * * * *

§708-831 Theft in the first degree. (1) A person commits the offense of theft in the first degree if he commits theft:

(a) By obtaining property from the person of another; or

(b) Of property or services the value of which exceeds $200; or

(c) * * * * [firearm]

(d) * * * * [explosive]

(e) * * * * [carcass]

(2) Theft in the first degree is a class C felony * * *

[EXCERPTS of Hawaii Election Laws - HRS Chap. 11]

§11-191 Definitions. When used in this subpart:

* * * *

(2) "Campaign treasurer" means a person appointed under section 11-198, and, unless expressly indicated otherwise, includes deputy campaign treasurers.

(3) "Candidate" means an individual who seeks nomination for election, or election to office. An individual is a candidate if he does any of the following:

(A) * * * *

(B) Receives contribution in an aggregate amount of more than $100, or makes or incurs any expenditures to bring about his nomination for election, or election, to office; * * *

(6) "Committee" means:

(A) Any organization or association, which, or any individual who, accepts a contribution or makes an expenditure for or against any candidate, individual who files

for nomination at a later date and becomes a candidate, * * * *

(B) Any organization or association, which, or any individual who, raises or holds money or anything of value for a political purpose, with or without the knowledge or consent of any candidate, * * * *

(7) "Contribution" means:

(A) A gift, subscription, deposit of money or anything of value, or cancellation of a debt or legal obligation and includes the purchase of tickets to fund raisers for the purpose of:

(i) Influencing the nomination for election * * * of any person to office * * * *

(B) The payment, by any person other than a candidate or committee, of compensation for the personal services of another person which are rendered to the candidate or committee without charge or at an unreasonably low charge for the purposes set out [above]; * * * *

(C) A contract, promise, or agreement to make a contribution; * * * *

(D) Notwithstanding the above, a candidate's expenditure of his own funds or the making of a loan or advance in the pursuit of his campaign shall not be a contribution for the purpose of this subpart but shall nevertheless be reportable as a campaign receipt. * * * *

(14) "Matching payment period" means:

(A) For a primary election, from January 1 of the year of a general election through the day of the primary election, * * * *

(19) "Private contribution" means a monetary contribution other than from a candidate's own funds or from the Hawaii election campaign fund.

(20) "Qualifying campaign contribution" means a monetary contribution of $100 or less, and not more than $100 of a person's total aggregate monetary contribution. Qualifying contributions do not include loans or

in-kind contributions.

* * * *

§11-198 Campaign treasurer. (a) Every committee, party, and candidate shall appoint a campaign treasurer on or before the day for filing an organizational report.

(b) A campaign treasurer may be removed at any time. * * * *

(c) Only the campaign treasurer and deputy campaign treasurers shall be authorized to receive contributions or make expenditures on behalf of the candidate, committee, or party appointing him.

* * * *

§11-199 Campaign contributions, generally. * * * *

(c) Each candidate and campaign treasurer shall report the amount and date of deposit of each contribution and the name, address, and occupation of each donor who makes a contribution whose aggregate value is more than $100.

* * * *

§11-202 False name. No person shall make contribution of his own money or property, or money or property of another person to any candidate, party, or committee in connection with a nomination for election, or election, in any name other than the true name of the person who owns the money or who supplied the money or property. All contributions made in the name of a person other than true or established name of the actual owner of the money or property shall escheat to the Hawaii election campaign fund.

* * * *

§11-217 Hawaii election campaign fund; creation. The Hawaii election campaign fund is created within the state treasury. The fund shall consist of all moneys collected from persons who have designated a portion of their income tax liability to the fund as provided in section 235-102.5 [authorizes income check-off], any general fund revenues appropriated, as well as all other moneys collected pursuant to this subpart. Payment

to each candidate from the fund shall be by the comptroller in the manner prescribed in section 11-222 [campaign funding; application].

* * * *

§11-219 Qualifying campaign contributions; amounts. As a condition of receiving public funds for a primary * * * election, a candidate shall have filed an affidavit with the [campaign spending] commission pursuant to section 11-208 to voluntarily limit his campaign expenditures and shall be in receipt of the following sum of qualifying campaign contribution for his respective office: * * * *

(2) For the office of lieutenant governor -- qualifying contributions which in the aggregate exceed $20,000; * * * *

* * * *

§11-220 Eligibility for payments. (a) To be eligible to receive payments under section 11-217, a candidate shall in writing:

* * * *

(3) Agree to an audit and examination by the [campaign spending] commission under section 11-225 [examination and audit]

* * * *

(b) To be eligible to receive payments pursuant to section 11-217, a candidate shall certify to the commission that:

* * * *

(4) Such candidate or committee authorized by such candidate has received the qualifying sum of private contributions for the office sought by the candidate as set forth in section 11-219; * * * *

(c) Each candidate and all committees authorized by such candidate in receipt of qualifying campaign contributions which may be taken into account for purposes of public funding shall maintain, on a form prescribed by the commission, records which show the date and amount of each such contribution and the full name, mailing address, and occupation of the person making the contribution. The candidate and all committees authorized

by the candidate shall transmit to the commission all reports with respect to such contributions which the commission may require.

* * * *

§11-228 Penalties; relief. (a) Any person violating any provision of this subpart other than in section 11-193(b)(1) [the commission's duty to supervise campaign contributions and expenditures], shall be punishable in the manner prescribed as follows:

(1) If a natural person, he shall be guilty of a petty misdemeanor and shall be subject to the penalties specified therefor; or

(2) If a corporation * * * *

(3) [Liability of individual officers and directors.]

(b) Any person may sue for injunctive relieve to compel compliance with this subpart.

(c) The provisions of this section shall not be construed to prohibit prosecution

under any appropriate provisions of the Hawaii Penal Code, including, but not limited to section 708-852 and 708-853 (forgery); section 708-855 (criminal simulation); section 708-856 (obtaining signature by deception); section 708-872 (falsifying business records); and section 708-874 (misapplication of entrusted property).

* * * *

APPENDIX D

HAWAII RULES OF EVIDENCE:

Rule 106 Remainder of or related writings or recorded statements. When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Rule 403 Exclusion of relevant evidence on grounds of prjudice, confusion, or waste of time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

APPENDIX E

EXTRACT OF TRIAL TESTIMONY OF DEFENDANT BERNALDO D. BICOY -- Transcripts July 3, 1986 Volume V, and July 7, 1986 ("Tr. 7/3/86 V" and "Tr. 7/7/86") [bracketed materials supplied for clarity purposes]:

July 3, 1986 Volume V Transcript:

[Begin page 4, line 2 - Direct Examination]:

* * * *

(By MR. HARAKAL) How about Hawaii?

WITNESS BICOY: I took the bar in 1956 in Hawaii and then got admitted then.

* * * *

[Begin p. 11, lns. 4-12]:

Q And Mr. Bicoy, did you have any government service with the State of Hawaii?

A In the legislative area, I a [sic] served as an administrative assistant for majority leader then in the Territorial Senate Herbert K.H. Lee. I served as assistant house clerk under speaker of the house, Charles Kauhani. And then in 1959, I ran for

the statehouse out from the Leeward area and was elected and in 1969, 10 years later, I ran again for the house and I got elected.

* * * *

July 7, 1986 Transcript:

[Begin p. 10, lns. 5-9]:

(By MR. HARAKAL): Mr. Bicoy, let me show you Court's exhibit 1. Mr. Bicoy, Court's exhibit 1 is in evidence, it is a transcript of the Channel 9 Bicoy newscast of July 12, 1984, is that correct?

WITNESS BICOY: This is aired on July 11th.

* * * *

[Begin p. 12, lns 5-9, 17-19, 24; p. 13, lns. 1-21; p. 14, lns. 7-22; p. 15, 10-25; p. 16, lns. 1-3; p. 17, lns. 3-9; p. 18, lns. 1-5; p. 19, lns. 6-13, 17-25; p. 20, lns. 5-25; p. 21, lns. 1-13; p. 22, lns. 4-12]:

Q Now, Mr. Bicoy, when the reporter from Channel 9 and the cameraman came over to your office and you met with them in your library. Did you have any papers or documents in front of you?

A Not that I can recall, no.

* * * *

Q That interview lasted approximately how long with Channel 9 representatives?

A Oh, anywhere from 6 to 10 minutes.

* * * *

Q Were you asked my [sic] questions by the Channel 9 representataive, the reporter? [P. 13, ln. 1]:

A Yes, it was all based on questions. He had a series of questions which he asked of me.

Q Mr. Bicoy, did you have a prepared format or typewritten statement to read to the press on July 11, 1986?

A No.

Q Mr. Bicoy, looking at Court's exhibit 1, the typewritten version of what was shown to the jury. Mr. Bicoy do you recall what question was asked of you when you made this response?

A I don't know, because this seems to be a combination of responses to questions.

I don't think this is a response to a particular question, I think this is an edited version of my response to those questions asked of me that day.

Q Mr. Bicoy, do you recall approximately how many questions were asked of you in number during that 6 to 10 minute interview with Channel 9 representatives?

A Oh, I would say anywhere from 6 to 10.

Q Questions?

A Questions.

* * * *

[Begin p. 14, lns. 7-22]:

Q Mr. Bicoy, before anything was shown on Channel 9 news that was aired, a broadcast aired about your interview, Mr. Bicoy at any time did you have a chance to review what Channel 9 would would show to the public before it was aired?

A No.

Q Were you allowed to review at any time what had been edited from your entire

interview, as compared to what was actually broadcast over the air to the public?

A I asked the interviewer if I could, you know -- you know how vain people are, I guess. I wanted to see what it looked like and they said you will see it on the newscast. That is all he said.

Q You never went down to the Channel 9 studios?

A No.

* * * *

[Begin p. 15, lns. 10-25; p. 16, lns. 1-3]:

Q Mr. Bicoy, do you recall if his question had anything to do with an application for public funding where in you used or someone used or somebody in the campaign committee used names for which no one had given any money?

A You know, to the best of my recollection, there was no -- nothing said about public funding or what they call qualifying contribution. I remember my response was to the effect that I -- I didn't believe that

there were any irregularities as far as my campaign was concerned. I remember saying that. It is not on the strip. I remember telling the interviewer that the law allowed contributors to contribute either in kind or services or money or anything of value, and that if the contributions -- if the services were worth more than $100 or the cash was more than $100 or anything of value over $100 like coffee or doughnuts, then [p. 16, lns. 1-3] the law required me to list those people who contributed more than $100 to be submitted to the public -- what do you call that, Campaign Spending Commission.

* * * *

[Begin p. 17, lns. 3-9]:

Q In glancing at any anywhere in that typewritten version of what you said to Channel 9 news is there any mention of qualifying contributions?

A No.

Q In fact, it talks only of contributions, correct?

A That is right.

* * * *

[Begin p. 18, lns. 1-5]:

Q Mr. Bicoy, Channel 2 came by on July 12, 1984 to do an interview of you, is that correct?

A Yes.

Q Where did that interview take place?

A Again, I am sure it was in my library.

* * * *

[Begin p. 19, lns. 6-13, 17-25]:

Q Mr. Bicoy, when the representative was there from Channel 2, did that representative take any handwritten notes of questions that was asked much [sic] you or answers that you may have given?

A Yes, yes. The same procedure. He had a list of questions to ask me, and the camera was pointed in my direction, and as I responded he took notes.

* * * *

[Begin, lns. 17-25]:

Q Do you recall how long the interview lasted with Channel 2, now?

A To the best of my recollection about the same span of time. About approximately 10 minutes of less.

Q Do you recall the number of questions that you were asked?

A No, I don't. Probably about the same. Because those questions were about the same area, covered the same area.

* * * *

[Begin p. 20, lns 5-25]:

Q Mr. Bicoy, the interview that you gave to Channel 2, did you have a chance to see the entire interview before anything was aired to the public?

A No.

Q Did you have a chance, Mr. Bicoy, at any time to see the edited version that was aired for broadcasting prior to its actual broadcast on television?

A No.

Q Now, Mr. Bicoy, the type written tran-

script that you have in front of you, Courts [sic] Exhibit 2 in evidence, have you had a chance to read that completely?

A Yes.

Q Mr. Bicoy, is there any mention in that typewritten version shown to the jury about qualifying contributions?

A No. To the best of my recollection, I don't recall this investigation as being -- involving qualifying contributions. I understood there were some questions about contributions from certain supporters and irregularities resulting from these contributions, and so that is what I [p. 21, lns. 1-13] talked about, contributions, not anything about qualifying contributions, no.

Q In fact, Mr. Bicoy, let me show you Defendant's Exhibit I in evidence, a sample of the form letter that Mr. Gonsales [executive secretary of the State Campaign Spending Commission] sent out. You read that before. There is no mention there about qualifying contributions at all, is there?

A None.

Q When you were sitting in front of the representative from Channel 2, now, did that representative, to the best of your memory, ask you any questions about qualifying campaign contributions?

A Not to the best of my recollection, no.

* * * *

[Begin p. 22, lns. 4-9]:

Q Mr. Bicoy, these interviews you gave -- that interview you gave to Channel 2. Did the representative from Channel 2 show you any document that came from the Campaign Spending Commission to look at while you were being questioned?

A No, he did not.

Q Likewise, with Channel 9, were you shown any document from the Campaign Spending Commission?

A. No, he did not.

APPENDIX F

EXTRACT FROM TRANSCRIPT JULY 2, 1986 VOL. IV ("Tr. 7/2/86 IV") -- Chambers Hearing on Defendants' Motion In Limine, pp. 19-27:

[Begin p. 19, line 12]:

(Following proceedings were held in chambers.)

THE CLERK: Calling 84-0350, Bernaldo D. Bicoy and Manuel DeMello.

MR. TASHIMA: Wayne Tashima, Deputy Prosecuting Attorney for the State of Hawaii.

MR. HARAKAL: Randy Harakal for Bernie Bicoy.

MS. GREEN: B. Regina Green on behalf of Manny DeMello.

THE COURT: You waive your client's presence for the purpose of this hearing?

[Begin p. 20, ln. 1]:

MR HARAKAL: Yes, Your Honor.

THE COURT: We are in chambers in the absence of the jury and should be noted. We are here to consider Mr. Harakal's motion in

limine to prevent the jury from hearing and viewing certain videotapes. And my purpose, at this time, is to view the tape to make a decision on that and the court reporter need not -- Ms. Court Reporter, you need not take down the transcription of the audio portion of the video tape.

(Tape was played.)

THE COURT: Mr. Harakal?

MR. HARAKAL: First part of my motion in limine is because rule 106 and 403 -- let's talk about 106A. According to the rules of evidence, rule 106 requires when writing or recording a statement or part of a deposition is introduced by a party, the adverse party may require the introducing party to submit the entire recorded statement which in fairness should be contemporaneously with the expert.

What bothers me about the tape, Your Honor, is that obviously there is more recorded than what we hear and the tape was edited. The thing is the Police Department in

their report on this case talked about the T. V. interview with Mr. Bicoy and they had down in their police report on page 6 that Mr. Bicoy was interviewed by Doug Wo July 11, [p. 21, ln. 1] 1982 [sic]. A subpoena was issued to Brian Peterson for the copy of a taped interview July 20. Peterson related the film was ready to pick up. The investigator knew that there was an entire tape not just the T.V. version and they made no effort to segregate or they allowed to edit and got the copy.

The second part is on July 12, 1984. They have Mr. Bicoy interviewed by Mr. Mark Segami. Another subpoena was issued to Walley Zimmerman (phonetic) and they received the tape July 18, 1984. They secondly requested that the T.V. station hold the entire film interview of Mr. Bicoy. What happens is the T.V. I guess edits what is on T.V. What is on or left, they use it for the next news or whatever they are doing.

My second argument goes to rule 403

to the part of prejudice and bias, unfair prejudice and confusion of issues. That is the exclusion of relevance of prejudice and confusion. The reason I cite that rule, Your Honor, is for two reasons. It's highly prejudicial to not have the entire tape because Mr. Bicoy may have explained that why he may have made the offer for his relatives. The actual evidence in the case shows he never did make an offer. He never did put money in.

Second of all, he was never indicted. If you remember the first date, he was not indicted for giving [p. 22, ln. 1] money to his relatives who in turn would use it to make contributions to the campaign. The evidence that we keep hearing is that there is relatives of Bicoy's family on the list, PF form, and somebody put in $100.00 for them, but the people that were called to testify never put the $100.00 in. Mr. Bicoy said on the tape, I told them I would give them the money and they could make the con-

tributions. There is no evidence that Mr. Bicoy turned money in for anybody on the list.

The second tape he says, I told them I would give them the money and give it to the committee. That tape talks about him giving money to the relatives who in turn take the money around and give it to the campaign. He was indicted by theft by deception by listing people on a PF form who never had given money to the campaign and that he or others on the committee had put the money in form [sic] while Mr. Bicoy is talkig about to me is not a -- would not be an offense under the indictment. It would probably be a violation of the campaign spending laws. It would be a petty misdemeanor. That is the reason I filed the motion in limine.

Thank you, Your Honor.

THE COURT: Mrs. Green, do you have a position?

MS. GREEN: We join in with Mr. Harakal's position.

[Begin p. 23, line 1]:

THE COURT: Okay Mr. Tashima.

MR. TASHIMA: With respect to the first part of the argument rule 106, this is the entire tape that was broadcasted to the people and the days mentioned. We don't have additional tapes, complete tape that was made of the interview and that is because according to television procedures, they edit the original tape for broadcast purposes. The State's interpretation of 106 is that this is the entire interview and we are not precluding or preventing anything else from coming in.

We ask the Court to allow us to play the whole tape which the Court has just viewed. We don't feel we are excluding anything. This is not taken out of context. These are complete conversation or statements made by the defendant.

With regard to rule 403, the argument about prejudice, the State can see no prejudice because contrary to what Mr. Hara-

kal said, Mr. Bicoy does state in the KGMB tape that he will give $100.00 to each of the relatives and he will give it to the committee. It didn't say that he in turn would turn it over to the committee. He will give it to the treasurer and he would list their names as part of the legal requirements. Therefore it falls into play that in what the witness have been testifying to, they did not out of their pocket contribute money; that Mr. Bicoy would [p. 24, ln. 1] donate it for them out of his pocket to the campaign without having them physically touch and then turning it over to the treasurer.

With that, we feel that the State would not be prejudicing either defendant by showing of the tape, but would -- it would aid the jury but attempts in understanding the the [sic] intent behind what the defendants planned to do.

THE COURT: Mr. Harakal?

MR. HARAKAL: I don't agree on the prosecution's statement about rule 106 in there

[sic] commentary. To give an example of using part of the deposition they said adverse party may require introducing the party is unfair to be considered. This is identical to the deposition. You take out the part that is good for your case and that was the part that was shown on the T.V. They had the opportunity to get the entire tape interview where there could have been exculpatory statements by Mr. Bicoy. I never did. I told them I would. We don't know. Mr. Bicoy's mouth was moving, but we heard Doug Wu [sic] speaking, we hear Mark Segami, we don't hear Mr. Bicoy's words, but his mouth is moving.

Because of that, it's prejudicial. It's unfair they had a chance to get the entire documents. they took what was on T.V. That is all what was shown to T.V. That he [p. 25, ln. 1] is not how the rule reads [sic]. If it's an entire recorded statement, you can't excerpt what you want to use. You got to give the adverse parties the entire

document. That is where we are getting -- we are not having the entire document. The police have it in the report.

THE COURT: I'm going to allow the portion of the tape into evidence, but only those portions that have Mr. Bicoy speaking. I am not going to allow Mark Segami's description of what the campaign law states, and particularly portions showing the documents when the two so called false donors because that is additional evidence that Mark Segami basically would be introducing into the trial.

As far as Mr. Bicoy's statements, they are statements by way of admissions and they're relevant as far as whether they are exculpatory statements that might have been on a tape. It's not the same as a deposition wherein a deposition, counsel can see in context the entire statement given by a deponent. In this case, it's mere speculation that they are exculpatory statements by Mr. Bicoy on a tape that Mr. Segami or Wu at one

time. The police may have gotten -- there is no evidence at all that in fact that's the case.

So the only context in which the statements Mr. Bicoy gave can be taken or the context which we see them on [p. 26, ln. 1] the videotape, the rest would be speculation. So I will allow for portions of each tape where Mr. Bicoy specifically is talking to be played to the jury and shown to the jury, but the lead in and lead outs, I am not going to allow them to view. So when the video is set up, it should be set up to the point where Mr. Bicoy starts talking and shutoff where the reporter starts talking and turn on when Mr. Bicoy is talking and turn off when Mr. Bicoy is not talking in the KHON tape. I think there's two segments in the KGMB tape. It's basically one tape segment and basically Doug Wu gets into talking and showing portions of the campaign spending law that which are not relevant to the case whatsoever.

The only relevant portions are the

words of Mr. Bicoy himself and that is all the jury should see and hear.

MR. HARAKAL: Your Honor, I ask for leave to have a hearing with Mr. Bicoy testifying to what he did say in the interview. That would given evidence to show there was a complete tape and that he never did it, even though he --

THE COURT: He will have a [sic] opportunity to testify, if he so desires.

MR. HARAKAL: It's prejudicial. If he testifies now, you can make a ruling. There is evidence that he said he did not say that he told the press people, [p. 27, ln. 1] I did not do it and they cut it out.

THE COURT: I don't believe that is necessary. I am not going to require that.

(Following proceedings were held in open court.)

* * * *

APPENDIX G

[The following written transcriptions are of Petitioner's television interviews admitted in evidence as State's Exhibits, which read as follows:]

STATE'S EXHIBIT 27: Newscast aired on July 11, 1984 over KGMB-TV:

"And the only thing I remember doing, which I don't think is wrong, is that I told the members of my family, my brothers and sisters, that since some of them indicated that they wanted to donate, that they don't have the money to donate ... I said, 'all right, I'll tell you what, I ... you tell everybody that I will donate a $100.00 for each of you, and I'll just give 'em to the committee, to the treasurer'; and that I would ah ... of course, the law requires that I list their names and addresses, and that's what I did."

STATE'S EXHIBIT 28: Newscast aired on July 12, 1984 over KHON-TV:

"My giving money to my relatives, and then contributing it to my campaign, was never done with the intent or with that particular intent. Because as I said, I had expected funding from other sources. Members of my committee and my campaign supporters may have, ah ... done the same thing; may have said, 'okay, I'll donate for you, I'll give you the money and ... but you okay, you okay it, to donate it to Mr. Bicoy's campaign.' And obviously, I wouldn't know that man, but at least my supporter would know."

APPENDIX H

EXTRACT OF TRIAL TESTIMONY OF STATE WITNESS ELIZABETH ABRISCE, the unindicted co-conspirator --- Transcript June 30, 1986 Vol. I ("Tr. 6/30/86 I") [bracketed materials supplied for purposes of clarity]:

[Begin page 96, line 19, Direct Examination]:

* * * *

(By MR. TASHIMA [Deputy Public Prosecutor]): During these eight meetings where public funding was raised or discussed, what type of a discussion was carried on?

WITNESS ABRISCE: We, the committee, approached Mr. Bicoy and asked that we go over for public funding and stay within the campaign spending limit because we felt that he was an unknown candidate and we could not raise the large sum of [p. 97, ln. 1] money that was needed to run the campaign and that is to stay within the campaign limit would be within the committee's goal. Although we know that being an unknown, we would have to

go over it, but we could not see that we could raise funds to go over the campaign. Mr. Bicoy felt that it could be done and he was not in favor of seeking public funds.

* * * *

[Begin line 12]:

Q How did you folks approach Mr. Bicoy on this topic?

A We would tell him that we should go over for campaign spending and we don't think we can go over the amount, raise over the amount and that is the way we approached the subject.

Q When you say that he was approached by -- would this be during a meeting where all of you were present?

A Yes.

Q About how many times would you say, if you can recall, that you folks approached Mr. Bicoy about applying for public funding?

A Maybe five times.

Q Of those five times, Mr. Bicoy would say, no, [p. 98, ln 1] he didn't want to go

for it?

A He did'nt want public funding.

Q Eventually you, the committee itself, did apply for public funding; is that correct?

A Yes.

Q Do you recall when that decision was made?

A I believe it was either the end of July or the beginning of August.

Q 1982?

A 1982.

Q Do you recall when the primary election was for that year?

A September. I really don't remember, it's so long ago.

Q It was before the primary election?

A It was before the primary, yes.

Q When the decision was finally made to apply for the public funding, who was present at the decision making process?

A I believe the committee, all of the people that were on the committee were there.

Q That would be at least you four: Mr. DeMello, Mr. Muraoka, Mr. Bicoy, do you recall anyone else being present?

A I think Mel [Mel Europa, campaign treasurer] was present and I can't remember [p. 99, ln. 1] anybody else. Maybe Eloise was present.

Q Whose idea was it to initially apply for public funding?

A It was the committee's idea.

Q The idea came up earlier on in the campaign?

A Yes.

Q When you say that the committee decided to apply for the public funding, who within that committee first brought it up?

A I think it was Manny [Manuel DeMello].

Q Did you know anything about the Campaign Spending Commission, at that time?

A Only that it was a matching fund raiser. A certain dollar value and the campaign commission would put in an equal a-

mount.

* * * *

[Begin p. 101, Line 19]:

Q After the decision was made to apply for the public funding, were you made aware that the application actually was made by the committee or by Mr. Bicoy?

A Yes.

Q How ere you made aware of that?

A They told us that we had gone for the meeting. They told us that we went for public funding.

[Begin p. 102, Line 1]:

Q Were you aware that Mr. Bicoy received a check from the Campaign Spendings [sic] Commission or from the controller's office?

A Yes.

Q Did you see that check?

A No.

* * * *

[Begin line 13]:

Q Now with respect to the application for public funding or going for the public

funding, what were you folks discussing about that? When I say you folks, I mean the committee.

A We were discussing how to go and get public funding, that you would need matching funds and that with the monies, what the monies were needed for and basically that was it.

Q What kind of discussions were there in terms of contributors to assist in getting the money to apply for public funding?

A What we were to solicit, you know, people for funds and we would ask anybody we knew to contribute and we [p. 102, ln. 1] needed to have names and that they have to be voters within the state. Registered voters.

Q Were you looking at at [sic] any specific amount of money to be contributed?

A No. Any amount they could contribute, that would be fine.

* * * *

[Begin line 13]:

Q So how did you go about soliciting

funds after the public funding decision was made?

A What I did was I asked my relatives if they wanted to contribute and if they couldn't contribute, if it's all right if -- I asked them if it was okay to put their names down as having contributed, and they said -- some contributed, some said, okay because Mr. Bicoy helped me in my campaign and they wanted to help him. They knew him and it was okay to say that they contributed.

Q How many people did you ask?

A It must have been maybe eight -- eight or ten.

Q These would be relatives and friends?

[Begin page 104, line 1]:

Q How many relatives and friends were there?

A They were all relatives.

* * * *

[Begin p. 105, line 17]:

Q For the four people that you say did

not contribute, your brother's ex-wife and your nieces and nephews, they gave you permission to use their names?

A Yes, they knew Mr. Bicoy and Mr. Bicoy helpd me and they wanted him to get to be lieutenant governor. They wanted to help, but they could not contribute money so they could sign the things, but they could not contribute money.

Q Were you asking them for a minimum amount, at [p. 106, ln. 1] that time?

A No. I told them what the maximum that could be contributed and whatever. They said they want to put down --

Q What was the maximum?

A I believe it was $100.00.

Q This idea of obtaining permission to use a name for those who could not contribute money, where did that come from?

A I believe, one it happened -- after a campaign meeting we had gone out and we were discussing raising funds and it was mentioned that our relatives wanted to con-

tribute, but they could not so, you know, what if it's all right if we ask them if it's okay if they make a contribution. If they could not, if it's all right we put their names down and they said okay. Then it was all right because they do that in other charity donations. They felt it was okay.

Q Who was part of this discussion after this meeting that was held?

A I believe it was Manny, Ken, and myself.

Q Was Mr. Bicoy there?

A He was in and out at that time of his office. I don't know if he was sitting there at the time, but he was in and out of the office.

[Begin p. 107, ln. 1]:

Q During the time that Mr. Bicoy would be going in an [sic] out of the office, would he sometime sit down and discuss the matters with you folks?

A Yeah.

Q Was this whole meeting concerning

soliciting contributions from relatives and friends?

A No, we would be discussing, critiquing what happened at public functions, and how Mr. Bicoy responded to questions, and how he looked, and things like his appearance, and his reply to the people that were there regarding the issues.

Q Who brought up the point that some of these relatives wanted to contribute but could not financially?

A I couldn't say who brought it up. I don't remember any one person saying it. There was a discussion that I remembered that I -- I said okay, but I cannot say any one person.

Q For these people that could not contribute, but were willing to let their names be used, where would the money come from?

A I asume it came from Mr. Bicoy because it was his campaign.

* * * *

[Begin p. 111, ln. 3]:

Q Do you know whether or not the same procedure that you were following for obtaining permission from people who could not contribute, whether that was followed by anyone else in the campaign?

A No, I didn't.

Q This was based upon a discussion that was held between yourself, Mr. DeMello, Mr. Muraoka and off and on Mr. Bicoy?

A Yes.

Q Did everybody agree to that procedure?

A No one said yes and no one said no. It was a discussion and, you know --

Q Did anybody strongly deviate from that type of a procedure in terms of just refusing to be part of it?

A No, not that I can recall.

Q Anyone ever question the illegality of the procedure being followed?

A No.

Q Did you your [sic] specifically ask Mr. Bicoy whether or not it was proper to do

that?

A No.

Q Were you asked to solicit any people?

A No.

* * * *

[Begin p. 112, ln. 4]:

Q Can you tell the jury what that is [State Exhibit 20]?

A It's an agreement that I would cooperate with the prosecuting attorney's office that if I don't they can prosecute me.

Q Did yo sign that agreement?

A Yes, I did.

Q Does that appear to be an original of the agreement that you signed?

A Yes.

Q Who was present during the signing of that agreement?

A My lawyer Mr. Rahr.

* * * *

[Begin line 18]:

Q Was Mr. Marsland [the Public Prosecutor] present, at that time?

A No.

Q Does his signature appear to be there?

A Yeah.

Q Were you explained the content of that agreement by your attorney?

A It's that I have to cooperate with the prosecutor's office or if I don't, then they have a right [p. 113, ln. 1] to prosecute me.

Q In terms of cooperating, you would provide truthful testimony in any proceeding relating to this case?

A Yes.

Q Did you understand it at that time you signed that agreement?

A Yes, I understood it.

Q Okay. Did you ever express to your attorney your understanding of unwillingness to sign that agreement?

A Yes.

Q What was the result of that?

A I had told him that I didn't want to

sign it because I felt it wasn't right because I was told that if I didn't cooperate that they would use a shotgun effect and that they would also prosecute me. They felt that I was innocent, but regardless, they would go after me too.

Q When you say shotgun, what do you mean?

A Anybody engaging in what they felt was a crime being committed, they would prosecute whether they were innocent or not.

Q After discussing with your attorney, Mr. [p. 114, ln. 1] Weight, being a criminal defense attorney, did he advise you to sign the agreement?

A He advised to sign it because he said he worked with the prosecutor's office before. He was in that office and he knows how it is. So, it's better for me to sign it than not to sign it.

Q He didn't force you to sign the agreement?

A No, but I took his recommendation

based on that he was in the prosecutor's office.

* * * *

[Begin p. 114, line 16]:

Q Did Mr. Bicoy, Mr. DeMello or Mr. Muraoka ever mention to you either casually or during a meeting that they had listed names of their friends and relatives who contributed, but got their permission to do so?

A Manny DeMello said that he had relatives and he had checks for the relatives that contributed and that is what I remember and Ken Muraoka I don't remember him saying anything in that he just turned in his list. That is what he said.

Q How about Mr. Bicoy? Mr. Bicoy had his own list [p. 115, ln. 1] and he had turned in that list, so that at that time when this was mentioned to you, did you feel that you were the only one submitting names and not having money to go along with those names?

A No, I felt that they must have been asking other people who didn't contribute.

Q So you felt they were doing what you were doing?

THE COURT: You have to answer orally. She can't take down the head shaking.

THE WITNESS: Oh, I forgot what my --

Q (By Mr. Tashima) The question was, did you feel that the other people Mr. Bicoy, Mr. DeMello, and Mr. Muraoka were doing what you were doing?

A I felt they were doing it. That's why I did it.

Q What did you base that feeling on? You felt they were doing it?

A From the last time we discussed it, it said we can do this.

Q But nobody ever subsequently got together and said or got into a meeting together and said, this is what we have been doing. To compare notes so to speak?

A No, we got together in a meeting and they said this is a list they had turned in

of names and money they collected. They did not say these are the lists and the [p. 116, ln. 1] people that did not contribute the list and this is [sic] the names.

* * * *

[Begin line 18]:

MR. TASHIMA: I have nothing further, Your Honor.

APPENDIX I

NO. 11634

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. BERNALDO D. BICOY, Appellant, Appellant.	CRIMINAL NO. 84-0350 (Circuit Court, First Circuit) STIPULATION REGARDING STATEMENT OF THE EVIDENCE AND PROCEEDINGS AND ORDER

STIPULATION REGARDING STATEMENT OF THE EVIDENCE AND PROCEEDINGS

Come now Defendant-Appellant BERNALDO D. BICOY and Plaintiff-Appellee STATE OF HAWAII, pursuant to Rule 10(c) of the Hawaii Rules of Appellate Procedure, and agree and stipulate as follows to evidence and proceeding involving the rejection of Proposed Jury Instructions Nos. 46, 47 and 49 of Defendant-Appellant BERNALDO D. BICOY:

1. The trial Judge was the Honorable Robert G. Klein.

2. The proposed Jury Instruction of all parties were heard in Judge Klein's chambers

on Wednesday, July 9, 1986, at approximately 1:30 p.m.

3. Defendant-Appellant BICOY requested that his Jury Instructions Nos. 46 and 47 relating to immunity agreements be given because of Plaintiff-Appellee's witness Abrisce's immunity agreement.

4. Plaintiff-Appellee's attorney, Wayne Tashima, objected to both of these particular instructions and stated this could be covered by an argument of bias by the witness.

5. Defendant DEMELLO's attaorney, Regina Green, joined in Defendant-Appellant BICOY's request.

6. Judge Klein ruled in favor of Plaintiff-Appellee's argument and stated the matter could be covered by a bias argument.

7. Defendant-Appellant BICOY requested that his Jury Instruction No. 49, relating to attorney and legislator as a defendant, be given since the Plaintiff-Appellee was going to argue Defendant-Appellant BICOY's status as an attorney.

8. Plaintiff-Appellee's attorney, Wayne Tashima, objected to this instruction and stated this could be covered in closing argument.

9. Judge Klein ruled in favor of Plaintiff-Appellee's argument.

DATED: Honolulu, Hawaii June 8, 1987.

/s/ Randall N. Harakal

RANDALL N. HARAKAL
Attorney for Defendant/
Appellant Bernaldo D.
Bicoy

/s/ Wayne Tashima

WAYNE TASHIMA
Attorney for Plaintiff/
Appellee State of Hawaii

APPROVED AND SO ORDERED:

/S/ Edward H. Nakamura

Justice of the Above-Entitled Court

This stipulation was submitted for my signature after the State had filed its answering brief.

STATE OF HAWAII vs. BERNALDO D. BICOY; CR. NO. 84-0350 (CIRCUIT COURT, FIRST CIRCUIT); STIPULATION REGARDING STATEMENT OF THE EVIDENCE AND PROCEEDING

APPENDIX J-1

NO. 11634

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. BERNALDO D. BICOY, and MANUEL DEMELLO,JR., Defendants-Appellants.	)	CRIMINAL NO. 84-0350

ORDER

Upon consideration of Defendant-Appellant Bicoy's "Motion for Release from Judgment of Conviction, or in the Alternative, for Stay of Execution of Mittimus, Pending Appeal," the papers in support and opposition, and the records and files in this case, it appearing that this court is without discretion to stay mittimus pending appeal, State v. Handa, 66 Haw. 82, 657 P.2d 464 (1983),

IT IS HEREBY ORDERED that the motion is denied, without prejudice to Defendant's seeking alternative relief should subsequent medical developments warrant.

DATED: Honolulu, Hawaii, October 16, 1986.

FOR THE COURT:

/s/ H. LUM

Chief Justice

APPENDIX J-2

NO. 11634

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII,	)	CRIMINAL NO. 84-0350
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	
	)	
BERNALDO D. BICOY,	)	
	)	
Defendant-Appellant.	)	
	)	

ORDER DENYING SECOND
EXTENSION TO FILE OPENING BRIEF

Appellant's ex parte motion for second extension of time to file his opening brief is hereby denied.

DATED: Honolulu, Hawaii, December 24, 1986.

/s/ YOSHIMI HAYASHI
Associate Justice

APPENDIX J-3

NO. 11634

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. BERNALDO D. BICOY, Defendant-Appellant.	CRIMINAL NO. 84-0350

ORDER

Upon consideration of appellant's motion for leave to file opening brief in excess of thirty-five pages, and the motion for leave to file opening brief without record references and to file amended opening brief with record references after transcripts are transmitted,

IT IS HEREBY ORDERED that the motions are denied.

DATED: Honolulu, Hawaii, December 30, 1986.

/s/ YOSHIMI HAYASHI
Associate Justice

APPENDIX J-4

NO. 11634

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII,	)	CRIMINAL NO. 84-0350
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	
	)	
BERNALDO D. BICOY,	)	
	)	
Defendant-Appellant.	)	
	)	

ORDER

Upon consideration of the request for extension of time to file transcript by court reporter Eileen Wong and the record,

IT IS HEREBY ORDERED that the request is denied because the record on appeal was docketed on October 20, 1986, and there has been no motion to supplement the record on appeal with transcripts.

DATED: Honolulu, Hawaii, February 11, 1987.

/s/ YOSHIMI HAYASHI
Associate Justice

APPENDIX J-5

NO. 11634

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. BERNALDO D. BICOY, Defendant-Appellant. and KENNETH K. MURAOKA, et al., Defendants.	CRIMINAL NO. 84-0350

ORDER

Upon consideration of the request for extension of time to file transcript by court reporter Eileen Wong and the record,

IT IS HEREBY ORDERED that the request is denied because the record on appeal was docketed on October 20, 1986, and there has been no motion to supplement the record on appeal with transcripts.

DATED: Honolulu, Hawaii, March 19, 1987.

/s/ FRANK PADGETT
Associate Justice

APPENDIX J-6

NO. 11634

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII,	)	CRIMINAL NO. 84-0350
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	
	)	
BERNALDO D. BICOY,	)	
	)	
Defendant-Appellant.	)	
	)	

ORDER

Upon consideration of Plaintiff-Appellee's Motion to Dismiss or in the Alternative, to Strike Opening Brief, the papers in support, and the records and files in this case, it appearing that Appellant's opening brief, filed herein on January 7, 1987, fails to comply in several respects with HRAP Rule 28(b) and is, in addition, in direct violation of this court's order dated December 30, 1986,

IT IS HEREBY ORDERED that Appellant's opening brief is stricken and Appellant's

counsel is fined the sum of $100 payable to the "William S. Richardson School of Law -- Dean's Discretionary Fund" for counsel's repeated failure to comply with the appellate rules. An affidavit of counsel attesting to said payment shall be filed with this court within 10 days from the date of this order.

IT IS FURTHER ORDERED that Appellant shall file an amended opening brief on or before April 30, 1987. Appellant is granted leave to supplement the record on appeal with relevant trial transcripts but all transcripts must be received by this court on or before April 24, 1987. Any further failure of Appellant's counsel to observe the appellate rules will result in the imposition of additional and more serious sanctions.

Appellee may file and amended answering brief within 20 days after service of the amended opening brief.

DATED: Honolulu, Hawaii, March 30, 1987.

FOR THE COURT:
/s/ EDWARD H. NAKAMURA
Acting Chief Justice

APPENDIX J-7

NO. 11634

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. BERNALDO D. BICOY, Defendant-Appellant.	CRIMINAL NO. 84-0350

ORDER GRANTING EX PARTE MOTION FOR EXTENSION TO SUPPLEMENT RECORD ON APPEAL

Pursuant to Defendant-Appellant BERNALDO D. BICOY's Ex Parte Motion to Supplement 1/ the Record on Appeal and good cause appearing therefore,

IT IS HEREBY ORDERED that Defendant-Appellant BERNALDO D. BICOY's Ex Parte Motion For Extension to Supplement the Record on Appeal is hereby granted from April 24, 1987 to May 15, 1987.

DATED: Honolulu, Hawaii, May 11, 1987.

/s/ YOSHIMI HAYASHI

Justice of the Above-Entitled Court

Petitioner's Explanatory Note:

1/ The Hawaii Supreme Court granted Defendant-appellant's ex parte motion to supplement the record on appeal, as moved in his motion, with trial transcripts of proceedings of:

Monday, June 30, 1986

Tuesday, July 1, 1986, Vol. II of VI

Tuesday, July 1, 1986, Vol. III of VI

Wednesday, July 2, 1986, Vol. IV of VI

Thursday, July 3, 1986, Vol. V of VI

Monday, July 7, 1986

Tuesday, July 8, 1986

Friday, August 29, 1986

APPENDIX - K

Petitioner's proferred Jury Instructions but refused by the state trial court:

"BICOY'S INSTRUCTION NO. 46

"You have heard the testimony of Elizabeth Abrisce. She is providing evidence for the government in exchange for a promise from the government that she will not be prosecuted for the things she is testifying about. She told the government what she would testify to in exchange for this promise if immunity from prosecution. [sic]

"The government may present the testimony of someone who has been promised favorable treatment in his own case in exchange for his testimony. Some people in this position are entirely truthful when testifying. Still, you should consider the testimony of Eizabeth Abrisce with more caution than the testimony of other witnesses. She may have had reason to make up stories or exaggerate what others did because she wanted to strike a good bar-

gain with the government about her own case. In deciding whether you believe Elizabeth Abrisce's testimony, you should keep these comments in mind."

"DEFENDANT BICOY'S INSTRUCTION NO. 47
(Immunity)

"One who testifies under a grant of immunity with a promise from the government that she will not be prosecuted is a competent witness. Her testimony may be received in evidence and considered by the jury even though not corroborated or supported by other evidence.

"Such testimony, however, should be examined by you with greater care than the testimony of an ordinary witness. You should consider whether the testimony may be colored in such a way as to further the witness' own interest, for a witness who realizes that she may procure her own freedom by incriminating another has a motive to falsify. After such consideration, you may give the testimony of the immunized witness such weight as you feel

it deserves."

"Devitt & Blackmar Federal Jury Practice and Instructions, V.2 §17.06"

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

BERNALDO D. BICOY,

Petitioner,

against

STATE OF HAWAII,

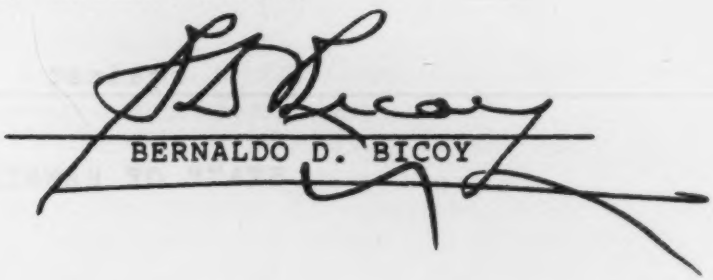
Respondent.

AFFIDAVIT - PROOF OF SERVICE

STATE OF HAWAII)
:ss.
CITY AND COUNTY OF HONOLULU)

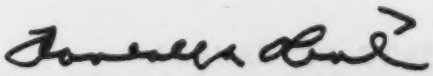
I, BERNALDO D. BICOY, defendant pro se, and the petitioner herein, depose and say: that on the 28th day of December, 1987, I served a copy of the foregoing Petition For Writ of Certiorari To The Supreme Court Of The State Of Hawaii on the State of Hawaii, respondent herein, pursuant to Rule 28.3 of the Supreme Court Rules, by delivering the

same to counsel in the offices of the Prosecuting Attorney of the City and County of Honolulu, counsel of record for said respondent, located at Suite 600, 1164 Bishop Street, Honolulu, Hawaii 96813.



BERNALDO D. BICOY

Subscribed and sworn to before me, at Aiea, City and County of Honolulu, State of Hawaii, this 28th day of December, 1987.



Notary Public, State of Hawaii

My Commission expires: 12/7/90